

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Caguas Educational TV, Inc.)	EB-04-IH-0382
)	Facility ID No. 27292
Licensee of Noncommercial Educational Station)	NAL/Account No. 200532080130
WLAZ(FM), Kissimmee, Florida)	FRN 0008628646

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: March 17, 2005

Released: March 17, 2005

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find that Caguas Educational TV, Inc. (“Caguas”), licensee of noncommercial educational Station WLAZ(FM), Kissimmee, Florida, has apparently violated section 399B of the Communications Act of 1934, as amended (the “Act”),¹ and section 73.503 of the Commission's rules,² by willfully and repeatedly broadcasting prohibited advertisements. Based upon our review of the facts and circumstances of this case, we conclude that Caguas is apparently liable for a monetary forfeiture in the amount of \$10,000.

II. BACKGROUND

2. This case arises from a complaint made to the Commission in July 2004 (“*Complaint*”), alleging that noncommercial educational Station WLAZ(FM) broadcast prohibited underwriting announcements during the month of May 2004. Thereafter, the Bureau inquired of the licensee concerning the allegations contained in the complaint.³ Caguas responded to the *LOI* on November 22, 2004.⁴

¹ 47 U.S.C. § 399b.

² 47 C.F.R. § 73.503.

³ Letter from William D. Freedman, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, to Caguas, dated October 7, 2004 (“*LOP*”).

⁴ Letter from Francisco R. Montero, Esq., and Alison J. Miller, Esq., to Kenneth M. Scheibel, Jr., Attorney, Investigations and Hearings Division, Enforcement Bureau, dated November 22, 2004 (“*Response*”).

III. DISCUSSION

3. Under section 503(b)(1) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.⁵ In order to impose such a penalty, the Commission must issue a notice of apparent liability, the notice must be received, and the person against whom the notice has been issued must have an opportunity to show, in writing, why no such penalty should be imposed.⁶ The Commission will then issue a forfeiture if it finds, by a preponderance of the evidence, that the person has willfully or repeatedly violated the Act or a Commission rule.⁷ As described in greater detail below, we conclude under this procedure that Caguas is apparently liable for a forfeiture in the amount of \$10,000 for its apparent willful and repeated violations of the Commission's underwriting rules.

A. Caguas Has Willfully and Repeatedly Broadcast Advertisements in Violation of Section 399B of the Act and Section 73.503 of the Commission's Rules

4. Advertisements are defined by the Act as program material broadcast "in exchange for any remuneration" and intended to "promote any service, facility, or product" of for-profit entities.⁸ The pertinent statute specifically provides that noncommercial educational stations may not broadcast advertisements.⁹ Although contributors of funds to such stations may receive on-air acknowledgements, the Commission has held that such acknowledgements may be made for identification purposes only, and should not promote the contributors' products, services, or businesses.¹⁰ Specifically, such announcements may not contain comparative or qualitative

⁵47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1); *see also* 47 U.S.C. § 503(b)(1)(D) (forfeitures for violation of 14 U.S.C. § 1464). Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history to section 312(f)(1) of the Act clarifies that this definition of willful applies to both sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the section 503(b) context. *See, e.g., Application for Review of Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991) ("*Southern California Broadcasting Co.*"). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc., Grand Isle, Louisiana*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC Rcd 1359 (2001) (issuing a Notice of Apparent Liability for, *inter alia*, a cable television operator's repeated signal leakage). "Repeated" means that the act was committed or omitted more than once, or lasts more than one day. *Southern California Broadcasting Co.*, 6 FCC Rcd at 4388, ¶ 5; *Callais Cablevision, Inc.*, 16 FCC Rcd at 1362 ¶ 9.

⁶47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

⁷*See, e.g., SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 ¶ 4 (2002) (forfeiture paid).

⁸ 47 U.S.C. § 399b(a).

⁹ *Id.*

¹⁰ *See In the Matter of the Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, Public Notice (1986), *republished*, 7 FCC Rcd 827 (1992) ("*Public Notice*").

descriptions, price information, calls to action, or inducements to buy, sell, rent or lease.¹¹ At the same time, however, the Commission has acknowledged that it is at times difficult to distinguish between language that promotes versus that which merely identifies the underwriter. Consequently, the Commission expects only that licensees exercise reasonable, “good faith” judgment in this area.¹²

5. At issue here are two underwriting announcements that Caguas admits that Station WLAZ(FM) repeatedly broadcast from April 1 through September 30, 2004.¹³ Caguas acknowledges that it received consideration for airing the messages on behalf of the station’s underwriters, Sol De Borinquen Bakery and Wanda’s Quality, that both are for-profit entities, and that the two messages were repeated a total of 404 and 1267 times, respectively, during this period.¹⁴ Although Caguas claims that it was under no “obligation” to broadcast underwriting announcements on behalf of “Wanda’s Quality,” the licensee represents that it did so as a “courtesy” to recognize the donor for providing the station with giveaway items that it, in turn, used for self-promotion.¹⁵

6. The announcements were broadcast in Spanish, and Caguas notes that its own translation of the Sol de Borinquen Bakery announcement is slightly different from that which the Bureau included with its *LOI*.¹⁶ Having reviewed Caguas’s version, we do not believe that it substantially alters the overall context or meaning of the underwriting message. However, we accept Caguas’s alternate text insofar as it represents the purported basis by which it claims to have attempted to exercise its “good faith” discretion under *Xavier, supra*. Thus, we have revised our attached transcripts to reflect Caguas’s translation of the Sol de Borinquen Bakery announcement.

7. After careful review of the record in this case, we find that both announcements apparently exceed the bounds of what is permissible under section 399B of the Act, and the Commission’s pertinent rules and policies, in light of the “good faith” discretion afforded licensees under *Xavier, supra*. The announcement for Wanda’s Quality states that the company has “the biggest variety of undershirts, polos, short and long sleeve oxford shirts,” and that they are “[t]he people that know most about embroidery and printing.”¹⁷ The announcement for Sol de Borinquen Bakery asserts that it is “the greatest bakery in Kissimmee;” and that it offers its “famous frappe.”¹⁸ We conclude that a noncommercial licensee, exercising “good faith,” could

¹¹ *Id.*

¹² See *Xavier University*, Letter of Admonition, issued November 14, 1989 (Mass Med. Bur.), *recon. granted*, Memorandum Opinion and Order, 5 FCC Rcd 4920 (1990).

¹³ *Response* at Exhibit A.

¹⁴ *Id.* at 3, 4.

¹⁵ *Id.* at 4. Caguas indicates that Wanda’s Quality “from time to time” provided the station with t-shirts which bore the station’s logo. *Id.*

¹⁶ *Id.* at 2. Caguas does not dispute the translation of the Wanda’s Quality announcement also contained in the *LOI*. *Id.*

¹⁷ See *Attachment*.

¹⁸ *Id.*

only conclude that the above statements make qualitative and comparative references to Wanda's Quality and to Sol de Borinquen Bakery, and that, in particular, the words and/or phrases "biggest," "people that know most," and "greatest," impermissibly seek to distinguish the underwriters' products and/or service favorably from that of their competitors. The announcements are thus promotional and prohibited.¹⁹

8. We further find that the announcements in question were broadcast in exchange for consideration. First, Caguas acknowledges that it aired the announcements for Sol de Borinquen Bakery on the basis of one announcement for each \$10 contributed.²⁰ With respect to the arrangement between Wanda's Quality and Caguas, "consideration," for purposes of section 399B of the Act, may take forms other than direct cash payments.²¹ Caguas admits that it aired the announcements to acknowledge that underwriter's donation of t-shirts bearing the station's logo, although it was not obligated to do so. In determining whether the announcements constituted prohibited advertisements under section 399B of the Act, it is sufficient to find that consideration was exchanged for their broadcast, and that the announcements promoted the services or products of for-profit entities.²² It is not necessary to find that the licensee was contractually obligated to pay the consideration. Finally, the Commission has long held licensees responsible for ensuring that any material broadcast in a foreign language conforms to the requirements of the Act and the Commission's rules.²³ To the extent that Caguas has overlooked its duties in this regard, we remind it to take appropriate care in the future to avoid further violations of this type.

B. Proposed Action

9. Section 503(b) of the Act and section 1.80(a) of the Commission's rules both state that any person who willfully or repeatedly fails to comply with the provisions of the Act, the rules or Commission orders shall be liable for a forfeiture penalty.²⁴ The Commission's *Forfeiture Policy Statement* sets a base forfeiture amount of \$2,000 for violation of the enhanced underwriting requirements.²⁵ The *Forfeiture Policy Statement* also provides that the Commission

¹⁹ See *Public Notice, supra*.

²⁰ *Response* at 4

²¹ See *Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 90 FCC 2d 895, 911 (1982), *recon.*, 97 FCC 2d 255 (1984) ("*Policy Statement*").

²² Moreover, in similar cases, the Commission has rejected arguments that such payments constituted general station contributions unrelated to the broadcast of underwriting announcements made on behalf of the donors involved. See *Penfold Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 23731 (Mass Media Bur. 1998).

²³ See *Licensee Responsibility to Exercise Adequate Control Over Foreign Language Programs*, Public Notice, 39 FCC 2d 1037 (1973).

²⁴ See 47 U.S.C. § 503(b); 47 C.F.R. § 1.80.

²⁵ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17115 (1997) ("*Forfeiture Policy Statement*"), *recon. denied* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b).

shall adjust a forfeiture based upon consideration of the factors enumerated in section 503(b)(2)(D) of the Act, such as “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”²⁶

10. In this case, it appears that, from April 1 through September 30, 2004, Caguas willfully and repeatedly broadcast advertisements in violation of section 399B of the Act and section 73.503(d) of the Commission’s rules. We believe that a substantial forfeiture is necessary because of the substantial period of time during which it aired the prohibited announcements, six months, and the 1,671 times that it repeated the announcements during that period. Nevertheless, we believe if we simply multiplied the \$2,000 base amount by the 1,671 apparent violations, the potential liability would be excessive in this case. Based on all of the circumstances, and after examining forfeiture actions in other recent underwriting cases, we believe that a proposed forfeiture of \$10,000 is appropriate here.²⁷

11. Accordingly, applying the *Forfeiture Policy Statement* and the statutory factors to this case, we conclude that Caguas is apparently liable for a forfeiture in the amount of \$10,000, for violating the Commission’s underwriting rules. We will not hesitate to take even stronger enforcement action against noncommercial educational licensees that engage in similarly serious violations of our underwriting requirements.

IV. ORDERING CLAUSES

12. In view of the foregoing, we conclude that a monetary sanction is appropriate. Accordingly, pursuant to section 503(b) of the Communications Act of 1934, as amended, and sections 0.111, 0.311 and 1.80 of the Commission’s rules, Caguas Educational TV, Inc., licensee of noncommercial educational Station WLAZ(FM), Kissimmee, Florida, is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of \$10,000 for willfully and repeatedly broadcasting advertisements in violation of section 399B of the Act, 47 U.S.C. § 399b, and section 73.503 of the Commission's rules, 47 C.F.R. § 73.503.

13. IT IS FURTHER ORDERED, pursuant to section 1.80 of the Commission’s rules, that within thirty days of the release of this Notice, Caguas SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

14. Payment of the forfeiture must be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL Acct. No. and FRN referenced above. Payment by check or money order may be mailed to

²⁶ 47 U.S.C. § 503(b)(2)(D). See also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100 ¶ 27.

²⁷ See, e.g., *Hispanic Broadcast System, Inc. (WQOZ(FM))*, Notice of Apparent Liability for Forfeiture, DA 05-349, __FCC Rcd__ (rel. Feb. 9, 2005) (\$10,000 forfeiture proposed for underwriting violations), *response pending*; *Minority Television Project, Inc. (KMTP-TV)*, Notice of Apparent Liability for Forfeiture, DA 05-348, __FCC Rcd__ (rel. Feb. 9, 2005) (\$7,500 forfeiture proposed for underwriting violations), *response pending*; *Christian Voice of Central Ohio, Inc. (WCVZ(FM))*, 19 FCC Rcd 23663 (Enf. Bur. 2004) (\$20,000 forfeiture proposed for underwriting violations), *response pending*; *Minority Television Project, Inc. (KMTP-TV)*, Forfeiture Order, 18 FCC Rcd 26611 (Enf. Bur. 2003), *application for review denied*, Order on Review, 19 FCC Rcd 25116 (2004) (\$10,000 forfeiture for underwriting violations), *recon. pending*.

Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. Payment by overnight mail may be sent to Bank One/LB 73482, 525 West Monroe, 8th Floor Mailroom, Chicago, Illinois 60601. Payment by wire transfer may be made to ABA Number 071000013, receiving bank Bank One, and account number 1165259.

15. The response, if any, must be mailed to William H. Davenport, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W, Room 4-C330, Washington D.C. 20554 and MUST INCLUDE the NAL/Acct. No. referenced above.

16. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the respondent’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

17. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.²⁸

18. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail/Return Receipt Requested, to Caguas Educational TV, Inc., P.O. Box 3986, Carolina, Puerto Rico 00984-3986, and to its counsel, Francisco R. Montero, Esq., and Alison J. Miller, Esq., Fletcher, Heald & Hildreth, P.L.C., 11th Floor, 1300 North 17th Street, Arlington, Virginia 22209-3801.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

²⁸ See 47 C.F.R. § 1.1914.

ATTACHMENT

The following text was transcribed from underwriting announcements broadcast over noncommercial educational Station WLAZ(FM), Kissimmee, Florida.

Wanda's Quality

Attention, churches, schools and businesses! Already, in Orlando embroidery and printing, Wanda's Quality! With the biggest variety of undershirts, polos, short and long sleeve oxford shirts, in all sizes for boys, ladies and gentlemen. Likewise, caps and promotional articles. Wanda's Quality! Telephone 407-301-5854, 407-301-5854. Wanda's Quality! The people that know the most about embroidery and printing. Wanda's Quality. Sponsored by Genesis.

Sol de Borinquen Bakery

Sol de Borinquen has opened its doors, the greatest bakery in Kissimmee. Sol de Borinquen Restaurant, 2510 Michigan Avenue. Breakfast, lunch, authentic Caribbean food, the famous frappe, hot bread (sobao and water). Wedding and birthday cakes, Caribbean style, cheese custard, brazo Gitano and many other authentic Caribbean foods. Sol de Borinquen Restaurant, 2510 Michigan Avenue, telephone 407-518-7755. Open from 6:00 a.m. Sol de Borinquen, an authentic Caribbean bakery.